

## Memorandum 81-63

Subject: Study H-405 - Marketable Title (Unperformed Land Sale  
Contracts--staff draft)

Land sale contracts take two general forms--an agreement for sale and an installment land contract. Either type may be recorded, although there is some dispute concerning the frequency with which either type is recorded. Once recorded the land sale contract substantially impairs marketability, since the rights of the buyer under the contract will be paramount to the rights of any other purchaser or encumbrancer.

The impairment of marketability is not resolved by the passage of time. Even if the buyer fails to perform at the time specified in the contract and four years elapses (the applicable statute of limitation to enforce the contract--Code of Civil Procedure Section 337(1)), the statute may have been extended or tolled by off-record events.

Attached to this memorandum is a staff draft of a statute to remove the cloud on title of an unperformed land sale contract by passage of time. The statute is drawn from the Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960). The statute provides that the contract expires by operation of law five years after the time for performance unless extended of record. The expiration period applies even though the statute of limitation may not yet have run on the contract due to tolling. The effect of expiration is to remove the cloud of the contract of record as to third persons; expiration does not affect the rights and duties of the parties to the contract between each other.

The net effect of this statutory scheme is that all existing law continues to apply to the land sale contract except the effect of recording. As to recording, expiration negates any notice to third parties so that the property is fully marketable after the statutory period.

One policy question is whether five years is too long a period. The Uniform Simplification of Land Transfers Act (1977) provides for clearing of record title 6 months after the date for performance or, if none is provided, 6 months after the date the contract was recorded. USLTA § 3-206. This is the same treatment both the Uniform Act and the Commission give to options. The staff draft follows the Model Act (five years) because this is closer to the statute of limitation. But it is arguable that the Uniform Act is correct and that options and land sale

contracts should be treated the same. They are similar interests that sometimes serve similar purposes. Perhaps it would be useful to distinguish between short-term agreements for sale, which could expire after six months, and long-term installment land contracts, which could expire after five years.

The staff does not believe there are any other significant policy questions to be decided in connection with this draft. It will improve marketability by enabling the property owner to resell without having to engage in quiet title litigation or to obtain a release from the buyer. If the Commission approves this scheme as a tentative recommendation, we will distribute it for comment.

Respectfully submitted,

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STAFF DRAFT

## TENTATIVE RECOMMENDATION

relating to

## UNPERFORMED LAND SALE CONTRACTS

Contracts for sale of real property are of two general types.<sup>1</sup> An agreement for sale (sometimes known as an "earnest money," or "deposit receipt" contract) is ordinarily to be performed within a relatively short period and results in a transfer of title.<sup>2</sup> An installment land contract (sometimes known as a "real property sale contract"<sup>3</sup>) is ordinarily to be performed over a longer period and is a type of security device as well as an agreement of sale.<sup>4</sup>

Either type of land sale contract may be recorded,<sup>5</sup> and recordation has the effect of clouding title. If a buyer defaults, the buyer more often than not fails to execute a release or reconveyance to clear the title. The unreleased contract for sale of the land continues to impair title and renders the property unmarketable and uninsurable until it is eliminated by a release from the buyer or by quiet title proceedings.<sup>6</sup>

The magnitude of this problem is not clear. It is said that land sale contracts are commonly recorded.<sup>7</sup> However, it has also been suggested

1. See, e.g., discussion in Bernhardt, Liability for Breach, California Real Estate Sales Transactions §§ 11.45-11.46 (Cal. Cont. Ed. Bar 1967); Hetland, Land Contracts, California Real Estate Secured Transactions § 3.59 (Cal. Cont. Ed. Bar 1970).
2. See, e.g., discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 11.4 (1974).
3. Civil Code § 2985.
4. See, e.g., discussion in 3 B. Witkin, Summary of California Law, Security Transactions in Real Property § 21 (1973). The installment land contract acquired considerable popularity during the early 1970's when it was perceived as circumventing the consequences of a due-on clause in a deed of trust. It was also widely employed in the early 1960's and before then as an inexpensive and expedient financing vehicle. R. Bernhardt, California Mortgage and Deed of Trust Practice § 1.7 (Cal. Cont. Ed. Bar 1979).
5. Gov't Code §§ 27280, 27288.
6. 1 A. Bowman, Ogden's Revised California Real Property Law § 11.27 (1974).
7. L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 152 (1960).

that because land sale contracts ordinarily are not acknowledged, they will not be recorded and thus not cloud title.<sup>8</sup>

If the seller under a land sale contract wishes to record, acknowledgment by the buyer is unnecessary.<sup>9</sup> If the buyer wishes to record, a number of means to obtain recordation are available.<sup>10</sup> It is ordinarily in the best interest of the buyer under an installment land contract to record.<sup>11</sup> It is less important to record an agreement of sale because it is of relatively short duration.<sup>12</sup>

In any event, it appears that there are many unreleased land sale contracts in the records that impair marketability of property.<sup>13</sup> Title is not cleared automatically by operation of the statute of limitation by the passage of four years after the date for performance of the contract.<sup>14</sup> The statute of limitation does not run against a buyer in possession<sup>15</sup> and there may be other events that do not appear of record but that toll the operation of the statute.<sup>16</sup>

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8. See discussion in J. Hetland, Secured Real Estate Transactions § 2.5 (Cal. Cont. Ed. Bar 1974).

9. Gov't Code § 27288.

10. See, e.g., discussion in Bernhardt, Liability for Breach, California Real Estate Sales Transactions § 11.72 (Cal. Cont. Ed. Bar 1967); Hetland, Land Contracts, California Land Security and Development § 2.17 (Cal. Cont. Ed. Bar 1960).

11. 1 (Pt. 1) H. Miller & M. Starr, Current Law of California Real Estate § 2:39 (rev. 1975).

12. This is particularly true where marketable title and title insurance are conditions of the contract.

13. P. Basye, Clearing Land Titles § 132 (2d ed. 1970).

14. The statute of limitation for enforcement of a land sale contract is four years. Code Civ. Proc. § 337(1). See also Stafford v. Ballinger, 199 Cal. App.2d 289, 18 Cal. Rptr. 568 (1962); Bernhardt, Liability for Breach, California Real Estate Sales Transactions § 11.38 (Cal. Cont. Ed. Bar 1967).

15. See, e.g., Kidd v. Kidd, 61 Cal.2d 479, 393 P.2d 403, 39 Cal. Rptr. 203 (1964).

16. See discussion in L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 153 (1960) and P. Basye, Clearing Land Titles § 132 (2d ed. 1970).

Property that is subject to a contract of sale is unmarketable because the current status of the contract can be determined only by reference to facts outside the record. A means should be provided to enable clearing of an unperformed land sale contract from record title by operation of law, without need for quiet title proceedings or a release from the buyer.<sup>17</sup> An ideal statute for this purpose should first eliminate any extensions of time for performance by facts outside the record, and then should declare the seller's title marketable after expiration of a stated period of time.<sup>18</sup>

The Law Revision Commission recommends that the cloud on title of an unperformed land sale contract be eliminated by passage of five years after the time for performance of the contract unless waived or extended of record.<sup>19</sup> The five-year period allows for the running of the statute of limitation plus an additional year for possible extenuating circumstances and is consistent with the general five-year statutes of limitation for real property actions.<sup>20</sup> This recommendation would not affect the ability of the seller to clear title before the passage of five years by a quiet title action or by obtaining a release from the buyer.

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The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Title 5 (commencing with Section 880.020) to Part 2 of Division 2 of the Civil Code, relating to land sale contracts.

The people of the State of California do enact as follows:

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17. A requirement should also be added to the law that the buyer must execute a release upon breach of the contract.
  18. Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960).
  19. The recommended legislation would only eliminate the cloud on title as it affects third parties; it would not alter the rights and obligations of the buyer and seller as between each other.
  20. Code Civ. Proc. §§ 318-320. Compare Uniform Simplification of Land Transfers Act (1977) § 3-206 (6 months).

Civil Code §§ 880.020-887.050 (added)

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

TITLE 5. MARKETABLE RECORD TITLE

CHAPTER 1. GENERAL PROVISIONS

Article 1. Construction

§ 880.020. Declaration of policy and purposes

880.020. (a) The Legislature declares as public policy that:

(1) Real property is a basic resource of the people of the state and should be made freely alienable and marketable to the extent practicable.

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property.

(3) Such interests and defects produce litigation to clear and quiet titles, cause delays in real property title transactions, and hinder marketability of real property.

(4) Real property title transactions should be possible with economy and expediency. The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose.

Comment. Subdivision (a) of Section 880.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1 (19\_\_). The declaration of public policy is intended to demonstrate the significance of the state interest served by this title and the importance of the retroactive application of the law to the effectuation of that interest. See In re Marriage of Bouquet, 16 Cal.3d 583, 592, 546 P.2d 1371, \_\_\_, 128 Cal. Rptr. 427, \_\_\_ (1976) (upholding changes in the community property laws as retroactively applied).

A statute may require recordation of previously executed instruments if a reasonable time is allowed for recordation. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 10.4 at 415-16 (1974). The burden on holders of old interests of recording a notice of intent to preserve is outweighed by the public good of more secure land transactions. See, e.g., Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957) (upholding Minnesota marketable title legislation):

A number of marketable title acts have been passed by various states. Such limiting statutes are considered vital to all who are engaged in or concerned with the conveyance of real property. They proceed upon the theory that the economic advantages of being able to pass uncluttered title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate. These statutes reflect the appraisal of state legislatures of the 'actual economic significance of these interests weighed against the inconvenience and expense caused by their continued existence for unlimited periods without regard to altered circumstances.' . . . They must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests.

Subdivision (b) is drawn from Section 9 of the Model Marketable Title Act. If the application of a particular statute or common law rule conflicts with the provisions of this title, this title governs.

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§ 880.030. Effect on other law

880.030. Nothing in this title shall be construed to:

- (a) Extend the period for bringing an action or doing any other required act under a statute of limitation.
- (b) Limit application of the principles of waiver and estoppel, laches, and other equitable principles.
- (c) Affect the operation of any statute governing the effect of recording or failure to record, except as specifically provided in this title.

Comment. Subdivision (a) of Section 880.030 is drawn from Section 7 of the Model Marketable Title Act and Section 3-308 of the Uniform Simplification of Land Transfers Act (1977). Subdivision (b) is new; notwithstanding the maximum record duration or period of enforceability of interests in property pursuant to this title, the owner of an interest may waive or be estopped from asserting the interest within the prescribed time. Subdivision (c) is drawn from Section 7 of the Model Act.

Article 2. Application of Title

§ 880.240. Interests excepted from title

880.240. The following interests are not subject to expiration pursuant to this title:

(a) The interest of a person using or occupying real property and the interest of a person under whom a person using or occupying real property claims, to the extent the use or occupancy would have been revealed by reasonable inspection or inquiry.

(b) An interest of the United States or pursuant to federal law in real property that is not subjected by federal law to the recording requirements of the state and that has not terminated under federal law.

(c) An interest of the state or a local public entity in real property.

(d) A conservation easement pursuant to Chapter 4 (commencing with Section 815) of Title 2.

Comment. Subdivision (a) of Section 880.240 is drawn from Section 3-306(2) of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) makes clear that if a person in possession claims under another person, whether by lease, license, or otherwise, the interest of the other person does not expire.

Subdivision (b) is drawn from Section 6 of the Model Marketable Title Act and Section 3-306(4) of the Uniform Act. The Comment to the Model Act states, "The exception as to claims of the United States would probably exist whether stated in the statute or not."

Subdivision (c) is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation.

Subdivision (d) recognizes that a conservation easement may be created that is perpetual in duration. Section 815.2.

[CHAPTER 2. MORTGAGES AND DEEDS OF TRUST]

[CHAPTER 3. DORMANT MINERAL RIGHTS]

[CHAPTER 4. UNEXERCISED OPTIONS]

[CHAPTER 5. POWERS OF TERMINATION]

[CHAPTER 6. ABANDONED EASEMENTS]



CHAPTER 7. UNPERFORMED LAND SALE CONTRACTS

§ 887.010. Definitions

887.010. As used in this chapter:

(a) "Land sale contract" means an agreement wherein one party agrees to convey title to real property to another party upon the satisfaction of specified conditions set forth in the contract, whether designated in the agreement a "land sale contract," "deposit receipt," "agreement for sale," "agreement to convey," "real property sales contract," "installment land contract," or otherwise.

(b) "Recorded land sale contract" includes the entire terms of a land sale contract that is evidenced by a recorded memorandum or short form of the contract.

Comment. Section 887.010 is drawn from Sections 2985 and 2985.51 and Business and Professions Code Section 10029 (real property sales contracts). This chapter applies to land sale contracts of all types, including both agreements for sale and installment land contracts; whether conveyance of title is to be made within one year from the date of formation of the contract is immaterial. This chapter also applies to agreements to convey that are dependent on performance of conditions other than payment of money.

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§ 887.020. Release of unperformed land sale contract

887.020. If the party to whom title to real property is to be conveyed pursuant to a recorded land sale contract fails to satisfy the specified conditions set forth in the contract and does not seek performance of the contract, the party shall execute a release of the contract, duly acknowledged for record, to the party who agreed to convey title.

Comment. Section 887.020 is new. It is analogous to the provision requiring reconveyance by the owner of an estate on condition subsequent that is defeated by nonperformance of the condition. Section 1109; see also Section 2941 (reconveyance upon termination of mortgage). Section 887.020 is intended to enhance marketability of title clouded by an unperformed land sale contract without the need to quiet title or await the lapse of the five-year period provided in Section 887.030 (expiration of record of unperformed land sale contract).

§ 887.030. Expiration of record of land sale contract

887.030. (a) Except as otherwise provided in this section, a recorded land sale contract expires of record at the later of the following times:

(1) Five years after the date for conveyance of title provided in the contract or, if no date for conveyance of title is provided in the contract, five years after the last date provided in the contract for satisfaction of the specified conditions set forth in the contract.

(2) If there is a recorded extension of the contract within the time prescribed in paragraph (1), five years after the date for conveyance of title provided in the extension or, if no date for conveyance of title is provided in the extension, five years after the last date provided in the extension for satisfaction of the specified conditions set forth in the contract.

(b) The times prescribed in this section may be waived or extended only by an instrument that is recorded before expiration of the prescribed times.

(c) The times prescribed in this section are absolute and apply notwithstanding any longer time applicable pursuant to any other applicable statute of limitation and notwithstanding any provisions for tolling a statute of limitation. Nothing in this section extends the period for enforcement or revives a recorded land sale contract that has expired and is unenforceable pursuant to any other applicable statute of limitation.

(d) A recorded land sale contract does not expire of record at the times prescribed in this section if within the times an action is commenced to enforce the contract and a notice of the pendency of the action is recorded as provided by law.

Comment. Section 887.030 prescribes the maximum duration of a land sale contract of record for purposes of marketability. The maximum duration does not affect the rights and obligations of the parties to the contract but only the effect of the recorded notice of the contract on third parties. See Section 887.040 (effect of expiration). Section 887.030 operates to clear record title of the contract after the time prescribed even though the general statute of limitation to enforce the contract may not have run due to tolling, possession by the purchaser, or for some other cause. The section does not extend the time provided by the general statute of limitation that applies to enforcement of a land sale contract. See Code Civ. Proc. § 337(1) (4-year limitation period). The cloud on title of an unperformed land sale contract, whether or not barred by the general statute of limitation, may be

removed by judicial action or may be removed by operation of law after passage of the time prescribed in this section. See Section 887.040 (effect of expiration).

Subdivision (a) adopts the five-year period of the Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960). The effect of subdivision (a) is to prescribe a maximum life for a land sale contract based exclusively on the record for marketability of title purposes.

Subdivision (b) provides that a waiver or extension of the expiration date of a land sale contract must be recorded to be effective. This accomplishes the purpose of enabling a determination of marketability based on the record alone.

Subdivision (c) makes clear that there can be no off-record extension or tolling of the expiration time of a land sale contract. While off-record extensions or tolling may be effective for purposes of the general statutes of limitation, they cannot extend the duration of record of a land sale contract past the times prescribed in subdivision (a).

Subdivision (d) makes clear that there is no expiration of a land sale contract by operation of law if a lis pendens is recorded before expiration. This is a specific application of the general provisions governing the effect of a lis pendens. See Code Civ. Proc. § 409.

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§ 887.040. Effect of expiration

887.040. Upon the expiration of record of a recorded land sale contract pursuant to this chapter, the contract has no effect, and does not constitute an encumbrance or cloud, on the title to the real property as against a person other than a party to the contract.

Comment. Section 887.040 is drawn from the Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960). A land sale contract that has expired of record does not affect third persons but may still affect the parties to the contract. See Section 887.030 (expiration of record of land sale contract) and Comment thereto. In addition, expiration of record does not affect the interest of a person using or occupying the real property. Section 880.240 (interests excepted from title).

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§ 887.050. Transitional provision

887.050. (a) Except as otherwise provided in this section, this chapter applies on the operative date to all recorded land sale contracts, whether recorded before, on, or after the operative date.

(b) This chapter shall not cause a recorded land sale contract to expire of record before the passage of two years after the operative date of this chapter.